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8 IN THE UNITED STATES DISTRICT COURT

9 FOR THE DISTRICT OF OREGON

10 CYNTHIA K. MOFFAT,

Civil No. 04-1270-AA  
OPINION AND ORDER

11 Plaintiff,

12 vs.

13 JO ANNE B. BARNHART,  
14 Commissioner of Social Security,

15 Defendant.

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26 AIKEN, Judge:

27 Claimant, Cynthia Moffat, brings this action pursuant to the  
28

1 Social Security Act (the Act), 42 U.S.C. § 405(g), to obtain  
2 judicial review of a final decision of the Commissioner. The  
3 Commissioner denied plaintiff's application for Disability  
4 Insurance Benefits (DIB) under Title II of the Social Security  
5 Act. 42 U.S.C. §§ 401-33. For the reasons set forth below, the  
6 Commissioner's decision is affirmed and this case is dismissed.

#### 7 **PROCEDURAL BACKGROUND**

8 Plaintiff protectively filed her application for DIB  
9 benefits on April 4, 2002. Tr. 50-51. She alleged disability  
10 due to bipolar disorder commencing on September 1, 1987. Tr. 62.  
11 Her applications was denied initially, tr. 24, and upon  
12 reconsideration. Tr. 31. On March 23, 2004, after a hearing,  
13 the Administrative Law Judge (ALJ) ruled that plaintiff was not  
14 disabled. Tr. 11-21. The Appeals Council denied plaintiff's  
15 request for review, tr. 6, making the ALJ's decision the final  
16 agency decision. See 20 C.F.R. §§ 404.981, 422.210.

#### 17 **STANDARD OF REVIEW**

18 This court must affirm the Secretary's decision if it is  
19 based on proper legal standards and the findings are supported by  
20 substantial evidence in the record. Hammock v. Bowen, 879 F.2d  
21 498, 501 (9th Cir. 1989). Substantial evidence is "more than a  
22 mere scintilla. It means such relevant evidence as a reasonable  
23 mind might accept as adequate to support a conclusion."  
24 Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting  
25 Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)).  
26 The court must weigh "both the evidence that supports and  
27 detracts from the Secretary's conclusions." Martinez v. Heckler,  
28 807 F.2d 771, 772 (9th Cir. 1986).

1       The initial burden of proof rests upon the claimant to  
2 establish disability. Howard v. Heckler, 782 F.2d 1484, 1486  
3 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate  
4 an "inability to engage in any substantial gainful activity by  
5 reason of any medically determinable physical or mental  
6 impairment which can be expected . . . to last for a continuous  
7 period of not less than 12 months. . . ." 42 U.S.C.  
8 § 423(d)(1)(A).

9       The Secretary has established a five-step sequential process  
10 for determining whether a person is disabled. Bowen v. Yuckert,  
11 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502, 416.920. First  
12 the Secretary determines whether a claimant is engaged in  
13 "substantial gainful activity." If so, the claimant is not  
14 disabled. Yuckert, 482 U.S. at 140; 20 C.F.R.  
15 §§ 404.1520(b), 416.920(b).

16       In step two the Secretary determines whether the claimant  
17 has a "medically severe impairment or combination of  
18 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.  
19 §§ 404.1520(c), 416.920(c). If not, the claimant is not  
20 disabled.

21       In step three the Secretary determines whether the  
22 impairment meets or equals "one of a number of listed impairments  
23 that the Secretary acknowledges are so severe as to preclude  
24 substantial gainful activity." Id.; see 20 C.F.R.  
25 §§ 404.1520(d), 416.920(d). If so, the claimant is conclusively  
26 presumed disabled; if not, the Secretary proceeds to step four.  
27 Yuckert, 482 U.S. at 141.

28       In step four the Secretary determines whether the claimant

1 can still perform "past relevant work." 20 C.F.R.  
2 §§ 404.1520(e), 416.920(e). If the claimant can work, she is not  
3 disabled. If she cannot perform past relevant work, the burden  
4 shifts to the Secretary. In step five, the Secretary must  
5 establish that the claimant can perform other work. Yuckert, 482  
6 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e) & (f), 416.920(e) &  
7 (f). If the Secretary meets this burden and proves that the  
8 claimant is able to perform other work which exists in the  
9 national economy, she is not disabled. 20 C.F.R. §§ 404.1566,  
10 416.966.

#### 11 **DISCUSSION**

12 In Step One of the sequential evaluation process the ALJ  
13 found that plaintiff had not engaged in substantial gainful  
14 activity during the period September 1, 1987, through December  
15 31, 1991 (alleged onset date through last date insured). Tr. 15,  
16 21. This finding is not in dispute.

17 In Step Two the ALJ found that plaintiff did not have a  
18 medically determinable physical or mental impairment which was in  
19 existence on or before her last date insured, which was December  
20 31, 1991, and thus found no severe impairment. Tr. 21. See 20  
21 C.F.R. § 404.1520(c). The ALJ therefore found that plaintiff did  
22 not have a disability as defined in the Act that began on or  
23 before December 31, 1991, her last date insured. Tr. 21.  
24 Because the ALJ found plaintiff not disabled at Step Two, he did  
25 not address any further steps of the sequential evaluation  
26 process. Id.

27 Plaintiff alleges that: (1) the ALJ failed to properly  
28 consider a retrospective diagnosis and opinion by plaintiff's

1 treating physician; (2) the ALJ erred in finding that plaintiff  
2 did not have a medically-determinable impairment that was severe;  
3 and (3) the ALJ was required to further develop the record by  
4 calling a medical expert to assess the records and infer an onset  
5 date.

6 In order to be found disabled, plaintiff must first show  
7 that she is "unable to do any substantial gainful activity by  
8 reason of any medically determinable physical or mental  
9 impairment." 20 C.F.R. § 404.1527(a)(1). The Commissioner's  
10 rulings and regulations provide that an impairment will only be  
11 found disabling if it "significantly limits [a claimant's]  
12 physical or mental ability to do basic work activities." 20  
13 C.F.R. § 404.1520(c). Examples of basic work activities include  
14 remembering simple instructions; use of judgment; responding  
15 appropriately to supervision, co-workers and usual work  
16 situations; and dealing with changes in a routine work setting.  
17 20 C.F.R. § 404.1521(b)(1)-(6). Plaintiff bears the burden to  
18 establish the existence of a severe impairment, as well as the  
19 burden to establish that it prevented her from performing  
20 substantial gainful activity, and that it lasted for twelve  
21 continuous months. Tidwell v. Apfel, 161 F.3d 599, 601 (9<sup>th</sup> Cir.  
22 1999).

23 The parties agree that plaintiff's disability insurance  
24 lapsed on December 31, 1991, tr. 15, and that plaintiff must  
25 establish disability prior to that date. Tidwell, 161 F.3d at  
26 601. Thus, plaintiff must establish that she became unable to  
27 work prior to December 31, 1991.

28 During the relevant time period, plaintiff's treating

1 physician was Jeffrey Young, M.D. Tr. 126-140. Dr. Young  
2 treated plaintiff beginning February 20, 1987, through September  
3 7, 1989. Tr. 19. In his initial report, Dr. Young noted that  
4 plaintiff did not have any psychotic symptoms or dangerous  
5 ideation, and that cognitively she was alert and oriented times  
6 three, with intact memory, probably above-average intelligence,  
7 and fairly good psychological mindedness. Tr. 140. Dr. Young  
8 diagnosed adjustment disorder and possible compulsive personality  
9 disorder. Id.

10 On June 4, 1987, Dr. Young wrote that plaintiff was mildly  
11 depressed and anxious but not so depressed as to require  
12 medication. Tr. 134. In November 1987, Dr. Young assessed that  
13 plaintiff had scattered thinking and preoccupations, and no clear  
14 psychotic symptoms, but stated that her "overall situation is  
15 bordering on a possible psychosis." Tr. 132-33. In July 1988,  
16 Dr. Young assessed possible psychosis due to LSD or other  
17 experiences, but noted that "this illness seemed to have  
18 resolved, although at times today the author felt she might have  
19 some ongoing ideas of reference." Tr. 128.

20 After sessions in August and September 1988, plaintiff did  
21 not see Dr. Young again for nearly one year, until July 1989.  
22 Tr. 17, 126, 130. On July 7, 1989, Dr. Young reported  
23 "[d]iagnostic possibilities include a borderline psychotic  
24 illness, the possibility of a traumatic sexual experience in the  
25 past is manifesting with a wide variety of emotional experiences  
26 and discomforts." Tr. 18, 130. Dr. Young's final examination on  
27 September 7, 1989, noted that plaintiff's psychological testing  
28 was normal, plaintiff's mental status was normal, her anxiety

1 level was within normal limits, and that there was no need for  
2 ongoing treatment. Tr. 20, 130.

3 The ALJ found that Dr. Young did not report a definitive  
4 psychiatric diagnosis at any point during his treatment of  
5 plaintiff beginning February 20, 1987, through September 7, 1989.  
6 Tr. 19. Dr. Young's records also do not reflect any specific  
7 functional limitations or suggest any restrictions in basic  
8 activities that might impact plaintiff's ability to work.  
9 Moreover, plaintiff concedes that her medical records showed no  
10 further mental health treatment until nearly seven years later on  
11 May 2, 1996, more than four years after her date last insured.  
12 The ALJ also relied on the fact that although plaintiff saw a  
13 OB/GYN physician regularly beginning November 1988 (Dr. Lavonda),  
14 Dr. Lavonda did not refer plaintiff to a psychiatrist until July  
15 1996. Tr. 18, 20, 323.

16 Finally, the ALJ correctly afforded Dr. Wittkopp's opinion  
17 little weight because he did not begin treating plaintiff until  
18 July 2001, more than nine years after her date last insured. Tr.  
19 20. The ALJ properly gave more weight to Dr. Young's treatment  
20 notes made contemporaneously during the relevant time period.  
21 "The opinion of a psychiatrist who examines the claimant after  
22 the expiration of his disability insured status, however, is  
23 entitled to less weight than the opinion of a psychiatrist who  
24 completed a contemporaneous exam." Macri v. Chater, 93 F.3d 540,  
25 545 (9<sup>th</sup> Cir. 1996).

26 The plaintiff also objects to the ALJ's comment that Dr.  
27 Wittkopp's "opinion is based primarily on the reports of the  
28 claimant and a review of records from Dr. Young which contain no

1 definitive psychiatric diagnoses and which link periods of  
2 exacerbation of the claimant's symptoms to substance abuse." Tr.  
3 20. I find that the ALJ's comment was at most, harmless error.  
4 The ALJ's comment that plaintiff's symptoms were exacerbated by  
5 substance abuse was harmless because no medically determinable  
6 impairment was found, with or without consideration of any  
7 alcohol or drug abuse (DAA) by plaintiff. The materiality of any  
8 DAA becomes an issue only if there is an initial finding that  
9 plaintiff is disabled. See 20 C.F.R. §§ 404.1535(b)(92),  
10 416.935(b)(2). There was not an initial finding of disability  
11 made here. The ALJ's finding of no disability during the  
12 relevant time period is supported by substantial evidence in this  
13 regard.

14 The plaintiff next contends that the ALJ applied an  
15 incorrect legal standard in determining that she did not have a  
16 "severe mental impairment." Plaintiff relies on Dr. Wittkopp's  
17 opinion finding that plaintiff suffered from bipolar disorder  
18 that significantly limited her capabilities. Tr. 402. However,  
19 as noted above, the ALJ correctly found that Dr. Wittkopp's  
20 opinion regarding plaintiff's limitations do not establish the  
21 existence of a medically determinable impairment and any  
22 resulting limitations at or before plaintiff's last date insured.  
23 I find substantial evidence that the plaintiff fails to meet her  
24 burden in this regard.

25 Finally, I disagree that the ALJ was required to further  
26 develop the record by calling a medical expert to review the  
27 evidence or to infer onset date. An ALJ's duty to develop the  
28 record is triggered only when there is ambiguous evidence or when



1 the record is inadequate to allow for proper evaluation of the  
2 evidence. Mayes v. Massanari, 276 F.3d 453, 459-60 (9<sup>th</sup> Cir.  
3 2001); 20 C.F.R. § 404.1512(e). Those are not the circumstances  
4 at bar.

5 I find that the ALJ provided specific and legitimate reasons  
6 for not accepting Dr. Wittkopp's retrospective diagnosis and  
7 opinion on disability. Here, medical records did exist for the  
8 period prior to plaintiff's date last insured. Dr. Young's  
9 contemporaneous records failed to document the existence of a  
10 medically determinable impairment, nor did those records  
11 establish any significant limitations in plaintiff's physical or  
12 mental ability to do basic work activities, as required under 20  
13 C.F.R. § 404.1521. Although plaintiff disagrees with the ALJ's  
14 interpretation of the evidence, the ALJ's interpretation was  
15 rational and supported by substantial evidence.

#### 16 **CONCLUSION**

17 The Commissioner's decision is based on substantial  
18 evidence, and is therefore, affirmed. This case is dismissed.  
19 IT IS SO ORDERED.

20 Dated this 20 day of September 2005.

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22  
23 /s/ Ann Aiken  
24 Ann Aiken  
United States District Judge  
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